No. 15,823

United States Court of Appeals

For the Ninth Circuit

ERIC SOBY, d/b/a Soby Painting Co., and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY, d/b/a Kuney-Johnson Company,

Appellees.

Appeal from the District Court for the Territory of Alaska, Third Division

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I. JURISDICTION

On May 15, 1959, appellants filed their opening brief herein, containing a Jurisdictional Statement which read in pertinent part as follows:

> "The District Court had jurisdiction of this case by virtue of the provisions of 40 U.S.C. 270 *et seq.* (49 Stat. 794), the so-called 'Miller Act'. * * * The Miller Act, * * *, covers subject matter directly within the cognizance and competence of a United States District Court (See: 28 U.S.C. 1331)."

Appellants' opening brief (O. Br.), at pp. 1-2.

Since then, on June 16, 1959, this Honorable Court decided the case of *Parker v. McCarrey,* No. 16,499, ... F.2d .....[1] Because of what was said there[2] it is now incumbent upon appellants to amend their previously submitted Jurisdictional Statement which was accepted by appellees.[3] The *Parker* decision, just quoted, relies for its holding upon an interpretation of the Alaska Statehood Enabling Act, Public Law 85-508, (72 Stat. 333, 48 U.S.C.A., 1958 Supp., pp. 4-13), and particularly Sections 12-18 thereof (see appendix to opinion in the *Parker* case, *supra*). Nothing in that Act contained has the effect of *changing* the character of the District Court for the Territory of Alaska, from which the present appeal is taken. On the contrary, Secs. 13 and 14 clearly show the intendment of the statute to be to continue that court in the same status and with the same powers and jurisdiction which it had prior to the Act, subject only to subsequent transfer proceedings as therein set forth.

It follows logically, that since the "territorial court" is not the "new United States District Court for the District of Alaska", *Parker v. McCarrey, (supra),* and since no United States District Court for the District of Alaska existed prior to the effec-

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[1]Not yet reported.

[2]"No one has suggested that the 'territorial court' which continues to act is the new United States District Court for the District of Alaska. And, such a suggestion could have no sensible basis."

[3]Appellees' brief, at p. 1; and see Transcript of Record, p. 36, for a statement of jurisdictional grounds relied on by defendants (appellees herein) for their "cross-complaint".

tive date (January 3, 1959) of the Act just referred to, no such court existed at the time the judgment here appealed from was entered and the court which entered it was the same "territorial court" referred to in the *Parker* decision and not a District Court of the United States for the District of Alaska.

It is undisputed[4] that both the original complaint filed below by plaintiff (appellant Soby herein) and the so-called cross-complaint filed below by defendants (appellees herein) were brought under the Federal statute popularly known as the Miller Act (40 U.S.C.A. 270(a)-271(d)).[5] The provisions of that Act which are here pertinent are contained in 40 U.S.C. 270(b) and read, in applicable part, as follows:

> "(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, *in the United States District Court* for any district in which the contract was to be performed and executed and not elsewhere, *irrespective of the amount in controversy* in such suit, * * *" (Emphasis supplied).

The language just quoted indicates plainly and without ambiguity that the forum designated by the Congress for suits brought under the statutory remedy created by the Miller Act is the United States District Court having appropriate venue, a court the jurisdiction of which is ordinarily circumscribed by limitations with respect to the amount in controversy.

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[4]Brief of Appellees, at p. 1 ("Jurisdiction").

[5]See footnote 3, *ante*.

Before the definitive pronouncement by this Court in *Parker v. McCarrey, supra,* quoted *ante* (footnote 2), the issue of whether the "District Court for the Territory of Alaska" is a United States District Court, was the subject of much controversy and seemingly conflicting decisions.

See, *e.g.,*

McAllister v. United States (1891), 141 U.S. 174, 11 S.Ct. 949, 35 L.ed. 693, affirming (1887), 22 Ct.Cl. 318;

United States v. Bell (1952), 14 Alaska 142, 108 F.Supp. 777;

But *cf.,*

International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation (CA 9th, 1951), 13 Alaska 291, 189 F.2d 177, affirming (1949), 12 Alaska 260, 83 F.Supp. 224;

U.S. v. King (1954), 14 Alaska 500, 119 F. Supp. 398.

The decisions cited above, however, are not in irreconcilable conflict. Rather, they agree with, and to that extent anticipate, *Parker v. McCarrey (supra),* in holding that the District Court for the Territory of Alaska (the court below) is *not* a United States District Court. The *Juneau Spruce* case *(supra),* and the *King* case *(supra),* however, hold that notwithstanding this distinction, the territorial court is possessed of jurisdiction coextensive with that of United States district courts, under and with respect to certain specific statutes, namely, the Labor-Management

Relations Act, 1947, (29 U.S.C. 141 *et seq.*), and the so-called Tucker Act (28 U.S.C. 81 *et seq.),* by virtue of the legislative intent expressed in these statutes when read with the provisions of 48 U.S.C. 101, which established a territorial district court "with the jurisdiction of district courts of the United States and with general jurisdiction * * *". Appellants are not aware of any case binding upon this Court which has examined the jurisdiction of the territorial court under the Miller Act, with which the case at bar is concerned.

While *Parker v. McCarrey, (supra),* makes no reference to the *Juneau Spruce case, (supra),* nothing in the latter opinion that is necessary to the holding therein would appear to conflict with the later decision that the territorial court indeed is not and never was a district court of the United States. This Court in the *Juneau Spruce* case, *(supra),* however, points out that the Labor-Management Relations Act, 1947, *(supra),* uses the terms "United States District Court" and "courts of the United States" loosely and interchangeably; and therefore even though the territorial court is not a District Court of the United States, "it is unquestionably, and under any test, a 'court of the United States'." 13 Alaska 291, 307. Hence it was held that the language of this particular statute was such as to include "the district court for the territory of Alaska". *Loc. cit.,* at p. 310.

With respect to the Tucker Act, the court in the *King* case, *(supra),* appears to have based its main reliance upon the legislative history of the Judiciary

and Judicial Procedure Acts (Title 28 U.S.C.) and the Federal Tort Claims Act (60 Stat. 842, 61 Stat. 722)—which was merged with the Tucker Act for purposes of codification of procedures (see: 28 U.S.C.A. 1346)—as indicating an intent to include the district court for the territory of Alaska. See: 14 Alaska 500, 510-511.

Without weighing, at this time, the soundness of the last mentioned decision, which was not appealed to this Court, it seems sufficient to point out that none of the ambiguities or considerations of legislative history applicable to the Labor-Management Relations Act of 1947 or the Tucker Act, referred to *ante,* apply to the present issue of jurisdiction under the Miller Act. As has been shown above, the Miller Act employs clear and unambiguous language. Its jurisdictional scope is restricted to District Courts of the United States, having (initially) *limited* jurisdiction with respect to the amount in controversy, whereas the District Court for the Territory of Alaska was not and is not such a court and was not and is not subject to such specific jurisdictional limitations. Accordingly, under the Miller Act, there is no room for the interpretive niceties of the cases cited above, but as in the *McAllister* and *Bell* cases, *(supra),* the issue is clear cut: If the District Court for the Territory of Alaska is not a United States District Court, it has no jurisdiction. Since *Parker v. McCarrey, (supra),* this issue is no longer open. Nor is it necessary to indulge in the customary speculations regarding the conceivable economic and sociological conse-

quences of such an omission, since the Alaska Statehood Enabling Act, *(supra),* appears to have solved this technical problem by the creation of a true United States District Court for the District of Alaska.

Accordingly, the court below was without jurisdiction to entertain the litigation between the parties in this case. By virtue of the provisions of 28 U.S.C.A. 1291, 48 U.S.C.A. 1294 and of Sec. 14 of the Alaska Statehood Enabling Act, *(supra),* this Court had and continues to have appellate jurisdiction over proceedings and judgments in the territorial court. In the exercise of this appellate jurisdiction, this Court has the power and duty to dismiss the action below for lack of jurisdiction, even though the objection is made for the first time in the appellate court. This is true even where the question of jurisdiction was not raised in the Court of Appeals until argument upon rehearing (or as here, in appellants' reply brief), since the question of jurisdiction is always open and since, moreover, the appellate court could consider the question upon its own motion.

> *Black & Yates v. Mahogany Asso.,* (CCA 3rd, 1941), 129 F.2d 227, (on rehearing, 1942), 148 ALR 841, 853, cert. den. (1942), 317 U.S. 672, 63 S.Ct. 76, 87 L.ed. 539.

Accordingly, there is appended to this reply brief, and incorporated herein by reference, appellants' motion suggesting lack of jurisdiction on the part of the court below and requesting that the judgment entered be vacated and the actions set forth in the complaint and cross-complaint below be dismissed.

Based upon the foregoing, appellants hereby amend the Jurisdictional Statement contained in their opening brief (O.B., at p.1), to read as follows:

> *"Amended Jurisdictional Statement*
>
> Jurisdiction of the court below was invoked under the provisions of 40 U.S.C. 270(a) *et seq.* (49 Stat. 794), the so-called Miller Act. Appellants assert that the court below, being a 'territorial court' and not a District Court of the United States, lacked jurisdiction over the subject matter.
>
> On May 2, 1957, this Court acquired, and therefore now has, jurisdiction pursuant to 28 U.S.C. 1291, which then provided that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 U.S.C. 1294 which designates this Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska. Public Law 85-508, approved July 7, 1958, effective upon admission of Alaska into the Union (January 3, 1959), eliminated the provisions which gave this Court jurisdiction of appeals from the District Court for the Territory of Alaska and established a United States District Court for the State of Alaska. However, Section 14 of that Act expressly continues the jurisdiction of this Court over all appeals taken from the District Court for the Territory of Alaska previous to the admission of Alaska as a state."

II. REPLY ARGUMENT ON THE MERITS

1. REPLY TO POINT (a) OF APPELLEES' FIRST ARGUMENT.

Appellees' brief requires some further comment, because, in some of its arguments, it proceeds to set up "straw-men", which are then painstakingly demolished. For instance, on page 8, appellees set up for argument a statement as follows: "Appellant's brief expressly concedes that Soby wilfully *(sic)* abandoned his subcontract without cause". Reference is then made to page 27 of appellants' brief.

An examination of that page of appellants' brief will show the concession of abandonment was made for the purpose of argument only. Appellant Soby's actual reason for stopping work on December 19, 1955, is set forth on pages 3 and 4 of appellants' brief, where it is stated that Soby was required to repaint some of the housing units under his contract as many as four times each, because the appellees used lumber and sheetrock containing excessive moisture which shrank under application of heat in the buildings, causing the painted surfaces to crack and joints to open. These defects, caused by appellees, forced appellant Soby to waste on re-do work moneys which he had planned to expend on performing his contract and thus, through the fault of appellees, Soby became insolvent and was forced, temporarily, to discontinue the progress of his work.

2. REPLY TO POINT (d) OF APPELLEES' FIRST ARGUMENT.

It was, of course, expected that the appellees would put forth in their brief the most advantageous (to them) version of their position with respect to appellants' charge that the costs claimed by appellees for completing the Eielson project were padded and thus unconscionable, but it was not anticipated that they would, with such brash contempt for the facts as well as the rules of arithmetic, manipulate figures to produce the manifestly absurd conclusion appearing in the middle paragraph of page 16.

In their attempt to re-analyze the clear and undisputed evidence contained in appellants' appendices 1 and 2 (Exhibits 46-1 and 46-2 below), which demonstrates that the claimed costs for Eielson were excessive, unsupportable and unconscionable, appellees have confused, to use a simile, apples with oranges.

Exhibit 46-2, the government payment estimate (appendix 2 to Appellants' brief) shows that the total sum of the Eielson contract at the prime contract level was $2,522,356.69. The exhibit also shows that the contract item of "interior finish" had a weight of 13.73% of the total contract or a dollar weight of $346,402.06. The exhibit further shows that the average percentage completion of the whole contract with respect to "interior finish" was 91.18%, leaving only 8.82% of "interior finish" to be performed to complete a full 100% of the project.

If "interior finish" had been painting—and painting *only*—then the appellees would have been in a position to claim from the United States the sum of

$346,402.46 for only one item of their contract, all of which they had subcontracted to appellant for $73,662.00. Now, it is quite obvious that appellees' item of "interior finish" included work other than painting.[6] It is equally obvious that when appellees take 8.82% of $346,402.46 and obtain the figure of $30,552.69 as the dollar value of the painting work remaining to be done at the time appellant Soby left the job, they are taking 8.82% of a figure which originally included many items other than painting. It is equally obvious why they have made this percentage application to the sum of $346,402.46 rather than the painting contract of $73,662.00. Appellees paid Larson, the painter hired to complete Soby's work, the sum of $33,251.06, which figure bears some resemblance to 8.82% of $346,402.46, *i.e.,* $30,552.69.

Appellant Soby's bid to Kuney-Johnson for performing the entire painting sub-contract at Eielson, was $73,622.00 (exclusive of extras). On December 31st, the date appellees filed their project progress estimate (Exhibit 46-2) with the United States, they claimed reimbursement from the United States for 91.18% for "interior finish" which item, together with other items of the contract completed, or nearly completed, made it possible for appellees to claim 97.41% of buildings complete and obtain payment from the United States for such percentage of completion. If, on this date, only 8.82% of "interior finish" remained to be completed and *that remainder was substantially all painting,* as claimed by appellants—*and*

[6] *cf.* Appellees' brief, pp. 13-14.

as expressly admitted by appellees (Appellees' brief, Note 9, page 16)—then this 8.82% factor must be applied to the *painting* item of $73,662.00 and not against all of the items under "interior finish" originally included in the aggregate sum of $346,402.46. Thus, 8.82% of $73,662.00 is $6,497.98, which is the true dollar value of the painting to be finished to make 100% completion possible.

This last figure corresponds closely with the testimony of appellants' accountant, Alford, who testified at the trial that on December 19th, the date appellant stopped work on Eielson, he had expended on that job $55,403.19 and could have fully completed his contract (performed all painting) for an additional expenditure of $4,541.00.[7] Considering that the average contractor in bidding a job includes, in addition to his actual estimated costs for labor and material, an additional 15% to cover overhead (compensation insurance, public liability, office expenses, etc.) and 10% more for profit, making a total of 25% over actual costs, it follows that $55,403.19 x 25% = $18,-415.50. Adding the normal overhead and profit to actual costs we arrive at a total figure of $73,818.69 or slightly in excess of the sum of appellant's contract (exclusive of extras). The actual sum necessary to *complete* "interior finish", assuming it was substantially all painting (as *admitted*), would then be based on the formula of 8.82% x $73,662.00 = $6,494.98, or a figure quite comparable to that given in the uncontroverted testimony of appellants' accountant that

[7] T.R. 1693.

Soby would have finished the job by expending $4,541.00 additional.[7a]

According to appellees' version, on the other hand, the "interior finish" portion of the Eielson job was 91.18% complete—or 8.82% incomplete, which corresponds to a dollar value in terms of the prime contract of $30,552.69, which appellees say was substantially all painting *(supra)*. This leads to the absurd result that the dollar value of the 8.82% unfinished painting work comes to 41.48% of Soby's price for doing *all* the taping, spackling and painting on the *entire* Eielson project. Yet appellees insist (on page 16 of their brief) that this is the correct yardstick to use in judging the reasonableness of the amount appellees paid Larson to finish Soby's work at Eielson!

In other words, appellees by the artful use of words and the juggling of unrelated figures have attempted to convey the impression to this Court that, according to the record, Soby left $30,552.69 worth of unfinished work at Eielson. It is, of course, true that when Larson finished the item designated "interior finish", the appellees, under the terms of the *prime* contract, were entitled to receive $30,552.59 from the United States, but this was based on appellees' gross contract price to the United States, which includes items other than painting, as well as the markup and profit over what appellees were obliged to pay their sub-contractors for the same work, which, of course, in the nature of such things, is considerably less than the prime contractor's price to the United States.

[7a]T.R. 1693.

The appellees claim that they paid Larson $33,251.-06 to finish Soby's incomplete work at Eielson. What was the estimated value of Soby's incomplete work? The undisputed figures show the incomplete portion to have been 8.82%. But 8.82% of what? Was it 8.82% of $346,402.46 as appelles would have the court believe, or 8.82% of Soby's contract price of $73,662.00? By appellees own admission, it cannot be the former because that would necessarily imply that at all times "interior finish" meant only painting. Yet appellees themselves emphasize that painting was only a fraction of the completed portion.[8]

Appellants submit, therefore, that when appellees, on page 16 of their brief take 8.82% of the prime contractor's "interior finish" figure of $346,402.46, of which only a part was painting, and then claim that the remaining work to be done—which *was* all painting—was of a dollar value of $30,552.69 (or 41.48% of appellant Soby's total contract for the *entire* job), they are once again resorting to the same kind of distortion that deceived the trial court and led it into error on the Eielson portion of the judgment.

III. STATEMENT IN OPPOSITION TO APPELLEES' MOTION FOR ATTORNEYS' FEES ON APPEAL

Appellees' motion for an allowance of additional attorneys' fees is ill-founded, due probably to out-of-state counsel's unfamiliarity with the local rule upon which they seek to rely.

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[8]Appellees' brief, at p. 13.

Appellees, on page 33 of their brief, correctly site Section 55-11-51, Alaska Compiled Laws Annotated, 1949, which codified the provisions of the Act of June 6, 1900, (31 Stat. 321, Ch. 786) with reference to the allowance of attorney's fees as part of costs, and which reads in pertinent part as follows:

> "* * * There may be allowed *to the prevailing party* in the judgment *certain sums* by way of indemnity for his attorney's fees in maintaining the action or defense thereto, which allowances are termed costs." (Emphasis supplied).

Appellees, however, do not appear to be aware of the standing rule of the District Court for the District of Alaska, which carries the statutory authorization into effect, and which reads in pertinent part as follows:

> "*Attorney's fees.* Allowance to prevailing party as costs: Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:* * *

		Non-Liens		
		Contested	Partly Contested	Non-Contested
First	$1,000	25%	20%	15%
Next	$1,000	15%	12.5%	10%
Next	$1,000	10%	9%	7.5%
Next	$2,000	5%	3%	1%
Next	$10,000	2%	2%	.5%
Next	$10,000	1%	1%	.5%
Next	$25,000	.5%	.5%	.25%

> * * * Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount. * * *"
>
> Amended Uniform Rules of the District Court for the District of Alaska, Rule 25 (a).

It is clear, therefore, that under the Alaska rule, attorney's fees may be allowed to the prevailing party, based upon a fixed percentage of the amount recovered, and without regard to man-hours, number of attorneys engaged in the handling of the case, or other criteria, which might ordinarily apply where there is no fixed standard and the fee is merely required to be "reasonable". Within the limitations of the discretion which may be exercised by the district court, the fee thus recoverable under the Alaska rule is very much like a contingent fee. Accordingly, the authorities relied on by appellees in support of their motion are simply not in point.

Their principal case, *American Can Co. v. Ladoga Canning Co.,* (CCA 7th, 1930), 44 F. 2d 763, for instance, arose under the terms of the provisions of Sections 2 and 4 of the Clayton Act (15 U. S. C. A. 13, 15) which reads, in pertinent part, as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States * * * and shall recover three-fold the damages by him sustained, and the cost of the suit, including *a reasonable attorney's fee.*" (Emphasis supplied).

It has been held that the reasonable attorney's fees allowable under this Section to a successful plaintiff are *not* to be calculated on the basis of a contingent fee.

> *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* (C. A. 8th, 1952), 194 F. 2d 846, 858, 859, cert. den. 343 U. S. 942, 72 S. Ct. 1035, 96 L. ed. 1348

Obviously, the amount of a "reasonable attorney's fee" cannot be finally determined until *all* of the attorney's work is done, including the prosecution or defense of an appeal. This is not true of the contingent or percentage arrangement, clearly contemplated by the Alaska rule and hence the case under the Clayton Act, relied on by appellees, is not apposite.

The same applies to the other cases cited by appellees in support of their motion, namely, *Salmon Bay Sand & Gravel Co. v. Marshall,* (CCA 9th, 1937), 93 F. 2d 1; *Radcliff Gravel Co. v. Henderson,* (CCA 5th, 1943), 138 F. 2d 549; and *Louisville & Nashville R. Co. v. Dickerson,* (CCA 6th, 1911), 191 F. 705. Both of the two gravel company cases first cited arose under the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U. S. C. A. 901 *et seq.*), which provides in pertinent part as follows:

> "No claim for legal services * * * rendered in respect of a claim or award for compensation * * * shall be valid unless approved by the deputy commissioner, or if proceedings for review of the order of the deputy commissioner in respect of such claim or award are had *before any court,* un-

> less approved by such court. Any claim so approved shall, in the manner and to the extent fixed by the deputy commissioner or such court, be a lien upon such compensation. * * *'' (Emphasis supplied).
>
> 33 U. S. C. A. 928 (a).

Hence the statute in question does not involve the allowance of attorney's fees as costs at all, but merely the approval of a lien against the ultimate money recovery by the claimant, out of which it must be paid. To the extent that this statute has any bearing by analogy, moreover, it is clearly distinguishable by use of its reference to the allowance of such fees upon review "in any court". Obviously, the language is broad enough to include appellate review in the United States Court of Appeals.

Finally, the *Dickerson* case, *(supra)*, cited by appellees, involved an action under the Interstate Commerce Act of February 4, 1887 (24 Stat. 384, 49 U. S. C. A. 1 *et seq.)*, as amended, and particularly Section 16 thereof, which provides in pertinent part as follows:

> "If a carrier does not comply with an order (of the commission) for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States * * * a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. * * * If the plaintiff shall *finally prevail* he shall be allowed a

reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. * * *'' (Emphasis supplied).

49 U. S. C. A. 16 (2)

Here again, the statutory language used refers to a "reasonable" attorney's fee, which, by definition, must abide the final event of the litigation, to be then determined based upon the reasonable value of such services.[9] The use of the italicized word "finally" in the proviso quoted above, moreover, emphasizes this legislative intent.

As has been shown, the effect of the Alaska rule, as spelled out by the statute and court rule set forth above, is to the contrary. It is, of course, elementary, that in the absence of statute, in an action at law, attorney's fee are no part of the costs.

Maryland Casualty Co. v. United States, to Use of Hayward, (CCA 4th, 1940) 108 F. 2d 784, 786

Hence such a statute and the rules promulgated thereunder are in derogation of the common law and must be strictly construed. Even under a liberal construction however, the Alaska rule as stated above does not reasonably yield the result contended for by appellees. It does not seem necessary to belabor the point, moreover, that even if it did, they would first have to "prevail" in this Court before their claim could be consid-

[9]And compare the use of the words "certain sums" in the Alaska statute, (*supra*).

ered. Thus, to that extent, their motion, apart from being ill-conceived, is also premature.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix 3

No. 15,823

United States Court of Appeals
For the Ninth Circuit

ERIC SOBY, d/b/a Soby Painting Co., and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY, d/b/a Kuney Johnson Company,

Appellees.

APPELLANTS' SUGGESTION OF LACK OF JURISDICTION IN THE LOWER COURT AND MOTION FOR VACATION OF JUDGMENT AND DISMISSAL OF ACTIONS

To the Honorable, the Judges of Said Court:

Appellants herein respectfully suggest to this Honorable Court, that the court below, the District Court for the Territory of Alaska, lacked jurisdiction over the subject matter of this cause, to wit, causes of action arising under the so-called Miller Act, 40 U. S. C. 270(a) *et seq.,* (49 Stat. 794), because said court was not and is not a district court of the United States.

WHEREFORE, appellants respectfully represent that the judgment appealed from was and is null and

void and move this Honorable Court to vacate the said judgment and dismiss the causes of action set forth in the complaint and cross-complaint filed below in the above-entitled cause.

Dated, at Los Angeles, California, this 27th day of July 1959.

Respectfully submitted,
Edgar Paul Boyko,
Harold J. Butcher,
Attorneys for Appellants
By Edgar Paul Boyko

Harry C. Wilson,
Of Counsel for Appellants

POINTS AND AUTHORITIES
IN SUPPORT OF THE FOREGOING MOTION

This motion is based upon the record on appeal in this case, and the statutory and judicial authorities set forth commencing on page 1 of appellants' reply brief, *(supra),* which are prayed to be taken a part hereof, as if fully set forth herein.

Respectfully submitted,
Edgar Paul Boyko,
Harold J. Butcher,
Attorneys for Appellants
By Edgar Paul Boyko

Harry C. Wilson
Of Counsel for Appellants